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In the

Supreme Court of the United States

ELLINORA V. CAGNA, in her capacity as Executrix of the Estate of Leo Cagna, deceased, and in her own right,

Petitioner,

v.

WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; WEIRTON RETIREMENT PROGRAM-PLAN 056; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PROGRAM-PLAN 056; NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM; RETIREMENT ADMINISTRATIVE BOARD OF THE NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

1. Whether a deceased pensioner's waiver of a qualified joint and survivor annuity ("QJ&SA"), and a spousal consent to such waiver, is invalid under the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1055 where the ERISA fiduciary fails to comply with the disclosure requirements specified under ERISA, the Internal Revenue Code of 1986 ("IRC") and the governing treasury regulations, thereby entitling the nonparticipant spouse to her 50% share of the QJ&SA?

2. If a waiver and spousal consent is nonetheless valid under Question 1 above, does ERISA's intent and objective in protecting beneficiaries, especially surviving spouses, preclude application of the detrimental reliance standard to a surviving spouse's claim for her share of the QJ&SA and require application of the prejudicial standard, so as to avoid circumvention of the ERISA protections promised under federal law?

PARTIES TO THE PROCEEDINGS

The parties to this case are the petitioner, Ellinora V. Cagna, and respondents, Weirton Steel Corporation Retirement Plan and National Steel's Weirton Retirement Program and the respective pension Committees.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (8a-23a)[1] is a summary judgment memorandum order and is unreported. The opinion of the United States Court of Appeals for the Third Circuit (1a-7a) which affirms the decision of the District Court is unreported. The United States Court of Appeals for the Third Circuit order denying rehearing and rehearing en banc (27a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. The order denying rehearing en banc was entered on July 21, 2003. On October 8, 2003, Justice Souter extended the time for filing a petition for a writ of certiorari to and including November 24, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The relevant federal statutory provisions are:

The Employee Retirement Income Security Act of 1974 ("ERISA"): 29 U.S.C. § 1055, the pertinent parts of which are reproduced in the Appendix hereto.

The Internal Revenue Code ("IRC"), 26 U.S.C. §§ 401(a)(11) and 417, the pertinent parts of which are reproduced in the Appendix hereto.

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[1] References to "a" are to the Appendix to this Petition.

The relevant treasury regulation provisions are 26 C.F.R. § 1.401(a)-11, 26 C.F.R. § 1.401(a)-20 and 26 C.F.R. § 1.417(e)(1), the pertinent parts of which are reproduced in the Appendix hereto.

STATEMENT

I. Factual Backround

A trial did not occur in this case. Petitioner, Ellinora V. Cagna ("Ellinora") is the widow of Leo Cagna ("Leo") who was an employee of Weirton Steel Corporation for 44½ years. As an employee, he participated in an ERISA-qualified defined benefit pension plan. After immigrating to the United States from Italy, Leo began his employment with Weirton Steel Corporation (then a division of National Steel Corporation) on December 17, 1951, when he was 20 years old. Leo and Ellinora were married on March 29, 1979.

Leo worked continuously for Weirton Steel Corporation until July 4, 1995, when Leo suffered a severe and debilitating heart attack caused by coronary artery disease. Leo was prevented from returning to work because of his heart condition and elected to take a disability leave of absence and began collecting sickness and accident disability payments of $500 per month in lieu of receiving wages. In May of 1996, two Weirton Steel physicians determined that Leo could never return to work due to his heart condition. At that time, Leo redeemed the cash value of his one and only life insurance policy covering his life to pay for accrued and unpaid medical and dental expenses. The life insurance was provided by Weirton Steel

Corporation. On June 25, 1996, after receiving disability payments for almost 1½ years, Leo decided to elect to accept an early permanent disability retirement.

The Weirton Steel Corporation Retirement Plan (the "Weirton Plan") and the National Steel Corporation Weirton Retirement Program (the "National Plan") jointly provide benefits to certain retirees, including Leo. On June 26, 1996, a pension representative representing both plans, met with Leo and Ellinora for approximately 15-20 minutes at the offices of Weirton Steel Corporation to cover Leo's selection and election of a post-retirement pension option under both the Weirton Plan and the National Plan. The only information brought to the June 26, 1996 meeting was a one-page, two-sided document captioned on one side "Post Retirement Option and Election and Certification" and entitled on the opposite side "Explanation of Post Retirement Option" (the "Option Form"). Leo and Ellinora briefly reviewed and executed the Option Form at the June 26, 1996 meeting. Neither the summary plan description, nor any other plan documentation was available or provided at the meeting. Ellinora was never told that her consent would be required, until the Option Form was presented at the June 26, 1996 meeting. At the time of the June 26, 1996 meeting, Leo was 64 years old and Ellinora was 60 years old. Leo died nine months later. The Option Form is at the heart of this case.

Leo and Ellinora both executed the Option Form. However, as Ellinora discovered nearly two years after Leo died, she was actually consenting to a waiver of the QJ&SA of $989.74 per month ($11,876.88

annually) should Leo predecease Ellinora. The Option Form fails to disclose the total amount of monthly benefits at stake as a result of making any of the four elections contained in the Option Form. The Option Form does not, *inter alia*, advise that certain benefit amounts need to be combined in order to obtain the true amount of monthly benefits at stake.

Leo died on March 24, 1997, less than 9 months after electing his retirement option and, thereafter, Ellinora began receiving a surviving spouse benefit of $490.74 per month. Because Ellinora was only receiving a monthly benefit of $490.74, Ellinora requested in writing copies of the plan documents which she received sometime during 1998. Ellinora reviewed the Option Form and discovered an error which indicated to her that she was entitled to an additional monthly benefit of approximately $175. As a result thereof, Ellinora asserted a claim against the Weirton Plan on December 2, 1998. The claim was reviewed and denied by the Weirton Plan Committee on December 16, 1998. Thereafter on March 9, 1999, Ellinora appealed the initial determination denying the claim and again requested her entitlement to an additional $175 per month. Ellinora later initiated a similar claim to the National Plan Committee.

On March 16, 1999, Ellinora's legal counsel received a letter from the Weirton Plan's legal counsel, who advised that Ellinora's "appeal letter of March 9, 1999 may reflect some confusion as to the two different forms of benefits [Ellinora] is claiming for the WSC Plan." The March 16, 1999 letter further discloses that if Ellinora were successful in her appeal she may also be entitled to her share of the QJ&SA of $989.74 per

month. Accordingly, the March 16, 1999 letter disclosed for the very first time the financial effect of the relevant options under the Weirton Steel Plan and National Steel Plan and the necessity of combining certain benefits in order to ascertain the amount of monthly benefits at stake. In short, Ellinora inadvertently discovered that the true monthly benefits to which she was entitled under the various options were never disclosed at the time Leo retired.

Ellinora was ultimately granted a monthly increase of $175.50 based upon her claim, but both the Weirton Plan Committee and the National Plan Committee denied her claim for her share of the QJ&SA based upon a finding that the Option Form allegedly complied with ERISA.

II. Proceedings Below

Ellinora brought this action in federal district court under ERISA § 1132 (a)(1)(B) and § 1132 (a)(3) seeking to obtain a fifty (50%) share of the QJ&SA. Ellinora also brought a contract claim.

The district court granted summary judgment in favor of the Defendants dismissing Ellinora's claims. The district court raised the issue of detrimental reliance *sua sponte* in its Memorandum Order when it held that

> Even if we assume, arguendo, a substantial likelihood that the election form supplied by defendants was so confusing as to mislead a reasonable employee as to his pension options, the

> record fails altogether to demonstrate incontrovertible evidence -- or even a reasonable inference of detrimental reliance by either of the Cagnas. (18a-19a)

The district court also found Ellinora's uncontradicted deposition testimony that she would not have consented to a waiver of the QJ&SA had full disclosure of the monthly benefits been made to Leo and her, to be insufficient to defeat defendants summary judgment motion. (19a)

On appeal, the Third Circuit found:

> If the success of [Ellinora's] appeal depended exclusively upon whether we were to find the form confusing, she likely would succeed in her appeal. It is difficult to find in it a satisfactory explanation as to the result of choosing the Automatic 50% Spouse Option. The waiver and option and its implications were stressed, while the implications of choosing the Automatic 50% Option--were not explained. The form seemingly does not comply with the relevant sections of the ERISA or the accompanying regulations. (15a)

Despite this holding, the Third Circuit nonetheless concluded that Ellinora was not entitled to her 50% share of the QJ&SA because she could not support a claim for detrimental reliance on the misleading information contained in the Option Form. The Third Circuit also found that Ellinora's claim was

speculative[2] because Ellinora could not prove what option Leo would have elected had the benefits been fully disclosed and adequately explained. The Third Circuit found to be hearsay Ellinora's uncontradicted deposition testimony that she would never have consented to a QJ&SA waiver had the actual financial effects of the various options been adequately disclosed. (7a)

Ellinora claims her consent was invalid as a matter of federal law under ERISA because she was not provided any explanation of the relative financial effect of the various elections to which she was entitled under the pension plans, if Leo were to predecease her. Although the Option Form violates ERISA in many respects, the Option Form is fundamentally flawed in that it fails to illustrate the "relative financial effect" among the available options. The Option Form does not explain, nor did the plan fiduciaries in any other manner reveal, the optional benefits need to be added together with the guaranteed spousal benefit in order to ascertain the total monthly benefit available to Ellinora, in the event that Leo should predecease Ellinora. However, despite the Third Circuit's finding

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[2] It should be noted that in *Genter v. Acme Scale & Supply Company*, 776 F.2d 1180 (3d Cir. 1985), the Third Circuit concluded that such speculation was not a bar to recovery. In *Genter*, a surviving spouse of a deceased employee was seeking life insurance benefits due her as a beneficiary under an employer sponsored life insurance plan. The Third Circuit held: "By reason of his death no one will know what his true preference would have been had he know of the midstream options. It is the employee's right to be informed of his rights however, rather than the wisdom of the employee's decision concerning these rights that the Act is intended to protect. Whether he would have opted for more coverage is not necessary for us to consider." 776 F.2d at 1186.

that Option Form failed to comply with ERISA and the governing treasury regulations, it refused to apply the statutory and regulatory remedy provided for under ERISA and denied Ellinora her 50% share of the QJ&SA.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari calls the Court's attention to two vitally important ERISA issues raised by the Third Circuit's decision below upon which the circuits are sharply divided. The subject matter of the issues affects a very broad segment of America's retiring workforce, since millions of Americans at sometime in their lives will become a widow or widower of an employee who participated in a private pension plan. The issues concern the failure an ERISA fiduciary to comply with ERISA § 1055, IRC §§ 401(a)11 & 417 and the governing treasury regulations thereunder when a participant and a nonparticipant spouse are presented with various benefits selections at the time a participant, including a possible waiver of the ERISA-mandated QJ&SA.

The circuits have taken a range of vastly differing approaches to both questions presented by this Petition, and only a ruling by this Court can insure the uniformity that Congress intended to establish by enacting the Retirement Equity Act of 1984 ("REA")[3] which significantly amended to ERISA. This particular case underscores the diametrically inconsistent results that a surviving spouse experiences in different circuits almost 20 years after REA's adoption.

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[3] Pub. L. No. 98-397, 98 Stat. 1426.

Millions of American workers are participants in private pension plans who, along with their spouses, rely solely on the financial information provided to them by the plan fiduciaries at the time retirement benefits are elected. If an inadequate, incomplete or incorrect explanation of the financial effects of the available benefit options is provided by the ERISA fiduciary to the participant and his spouse, any waiver and consent of the mandatory QJ&SA obtained from a participant and spouse by a private pension plan is not valid as a matter of Federal law under ERISA. These pension plans are designed to provide a measure of financial security for the participant's retirement years and equally important, the retirement years of the nonparticipant surviving spouse.

The Third Circuit's decision not only goes far beyond that of any other circuit that has addressed either issue raised here, it also directly contravenes the statutory and regulatory language and the public policies Congress adopted in passing ERISA. It is obvious that congressional intent was clearly manifested when ERISA was amended in 1984 by the enactment of REA. As originally adopted, ERISA failed to express with sufficient clarity the nature and extent of the interests of a nonparticipant spouse in the participant spouse's ERISA-covered retirement plan. After ERISA had been on the books for a decade, Congress comprehensively amended and supplemented it with REA. One of the express purposes of REA was to confirm the importance of the financial security of the nonparticipant surviving spouse and to safeguard his or her interest from the havoc created by the death of the participant spouse.

The primary way that REA achieves this intended result is by mandating that ERISA pension plans include automatic survivor benefits in favor of the nonparticipant spouse. However, despite the fact that REA has been on the books for nearly twenty (20) years, some of the circuits strictly construe the spousal rights while other circuits ignore the congressional mandate, thereby rendering a nullity the REA amendments to ERISA and the IRC. Although President Ronald Reagan signed REA into law on August 23, 1984, the circuits continue to misconstrue the scope and breadth of the spousal rights contained therein, thereby denying a surviving spouse the benefits promised under ERISA.

REA amended ERISA and the IRC to introduce mandatory spousal rights in pension plans. REA's legislative history "reflects that Congress viewed the marriage relationship as a partnership, and the retirement benefit resulting for that partnership as derived from the contributions of both spouses." INTERNAL REVENUE MANUAL § 4.72.9.1.1 (March 1, 2002). REA greatly augmented a nonparticipant spouse's rights and required that all pension plans offer married participants a qualified joint and survivor annuity when REA added ERISA § 205 and IRC §§ 401(a)(11) and 417, effective for plan years beginning in 1985.

As a result of the Third Circuit's rejection of Ellinora's claim, private pension plans continue to fail to appreciate, or ignore, a nonparticipant's spouse's rights under ERISA without consequence.

I. CONFLICT EXISTS WITHIN THE CIRCUITS ON THE SCOPE AND BREADTH OF A NONPARTICIPANT SPOUSE'S PENSION RIGHTS UNDER ERISA § 1055 AND THE THIRD CIRCUIT'S DECISION BELOW DISSERVES THE STATUTORY AND REGULATORY LANGUAGE OF ERISA

There is a direct conflict between the decision of the Third Circuit in this case and the Eleventh Circuit's decision in *Lasche v. George Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997). That conflict concerns a question of national significance to all participants and nonparticipant spouses of private pension plans. Does the failure of an ERISA fiduciary to comply with the disclosure requirements specified under ERISA invalidate a participant's waiver, and a spousal consent thereto, of a QJ&SA?

A. The Eleventh Circuit's approach to ERISA § 1055 is preferable the Third Circuit's approach

In the Third Circuit, a waiver of the automatic QJ&SA is valid under ERISA even if the ERISA fiduciary failed altogether to follow the rigorous ERISA requirements in obtaining the participant waiver, and spousal consent thereto, unless the nonparticipant spouse can establish that her deceased husband would not have waived the QJ&SA had full disclosure of the effect of the waiver of the QJ&SA been made. The Third Circuit held:

> Under the retirement plan and ERISA, her only role was to evidence her understanding of and agreement in the waiver. Her statement that she would not have signed the waiver if she had fully understood misses the mark. The real question is: What would her husband have chosen? How do we know which of the four options he would have chosen? (6a).

This holding conflicts with the standards specified in ERISA and its implementing regulations by requiring a surviving spouse to prove elements not contemplated by ERISA, the IRC or the treasury regulations, and imposing a fiduciary duty on the plan participant and his spouse, instead of the ERISA fiduciary. The Third Circuit's denial of Ellinora's 50% share of the ERISA mandated QJ&SA ignores ERISA and the IRC's clear mandate and the mandatory regulations promulgated thereunder. If Ellinora would not have consented to the waiver, the waiver is ineffective under ERISA § 1055(c). It matters not what option Leo would have chosen. The Third Circuit's decision utilizes precisely the type of analysis and speculation Congress and the Treasury sought to avoid by adopting REA and the regulations thereunder.

However, in the Eleventh Circuit, if the disclosure of the waiver did not meet the rigorous requirements of ERISA § 1055, the waiver and consent are invalid as a matter of law. *Lasche v. George Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997). In *Lasche*, the absence of a notary signature and seal invalidated the purported spousal consent, despite the fact that the spouse admitted her signature was

authentic. Accordingly, despite a relatively minor (and, unlike the instant case, perhaps a non-substantive) violation of ERISA, the Eleventh Circuit ruled that because of the public policy concerns underlying REA in protecting spouses' rights to spousal retirement benefits any waiver of retirement benefits must strictly comply with the applicable ERISA requirements.

B. Other circuits have applied the rigorous requirements contained in ERISA § 1055 to determine a surviving spouse's entitlement to a share of the QJ&SA

In the Seventh Circuit decision in *Butler v. Encyclopedia Brittanica, Inc.*, 41 F.3d 285 (7th Cir. 1994), the validity of a spousal consent form was again at issue. There, a surviving spouse challenged the spousal consent because a notary public was not physically present when the consent form was executed. In upholding the form valid, the Seventh Circuit discusses at length the rigorous ERISA § 1055 requirements. Again, in *Butler*, the ERISA violation concerned a relatively minor violation of ERISA § 1055 violation, not a failure to provide an explanation as in the Third Circuit decision below.

The Fourth Circuit decision in *Graef v. Retirement Income Plan for Employees of Albemarle Corporation*, 166 F.3d 332 (4th Cir. 1998) is a further illustration of the disarray among the circuits with respect to a nonparticipant spouse's rights. In *Graef*, the Fourth Circuit ignored ERISA and looked to federal common law in determining whether a nonparticipant spouse had waived her rights to her deceased husband's pension. There, the Fourth Circuit

concluded that § 1055 did not apply and the nonparticipant spouse had waived her rights because she failed to appeal a state family court decision affecting her deceased husband's pension.

The Fourth Circuit did an about-face in *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002) where it adopted the *Lasche* approach and acknowledged the risks of a spouse's unwitting waiver. In *Hagwood*, a month before their marriage, a husband and wife executed a premarital agreement, agreeing that the property of each would remain separate after their marriage and explicitly waived any right to each other's property. The Fourth Circuit held that because the premarital agreement did not comport with the formal requirements under ERISA § 1055, it could not be enforced to deny spousal rights in the deceased participant's pension plan. The Fourth Circuit concluded that "ERISA formalities must, therefore, be strictly enforced." 282 F.3d at 290.

The *Lasche* approach was also annunciated in *Rice v. Rochester Laborers' Annuity*, 888 F.Supp. 494, 498 (W.D.N.Y. 1995) (citations omitted), where the court stated that, "under ERISA, waiver of the qualified joint and survivor annuity, the standard form of payment from a defined benefit plan to a participant before death, is invalid unless it satisfies the rigorous rules in Section 1055(c)."

The Eleventh Circuit's approach in *Lasche* which has been followed by a majority of the federal courts, follows the statutory and regulatory mandate expressly specified in ERISA and the governing treasury regulations.

C. The Third Circuit's approach is not well founded

With regard to ERISA's rigorous prerequisites for the waiver of a QJ&SA to be validly effectuated, 29 U.S.C. § 1055(c) mandates that a plan shall provide that an election to waive the QJ&SA shall not take effect unless the spouse consents in writing to such election and that each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe), a written explanation of the terms and conditions of the qualified joint and survivor annuity and the rights of the participant's spouse.

29 U.S.C. § 1055(c)(3)(A).

Under ERISA, the spouse must consent to a waiver of the QJ&SA in writing and the signature must be witnessed by a pension plan representative or a notary public. 29 U.S.C. § 1055(c)(2); IRC § 417(c)(2), 26 U.S.C. § 417(c)(2). ERISA and the treasury regulations promulgated thereunder, describe what information must accompany the consent to the waiver of a joint and survivor annuity. The requirement seeks to ensure that spouses will receive information about the effect of choosing a life annuity—the option to receive higher pension benefits during the retiree's lifetime with no chance of receiving survivor benefits. If the spouse fails to consent (except in limited situations, see IRC§ 417(c)(2)(B)), the participant loses the right to select the single life option. See generally D. McGill and D. Grubbs, Jr., FUNDAMENTALS OF PRIVATE PENSIONS, *Retirement Benefits* at 138-43 (6th ed.

1989). Private pension plans that offer monthly pension retirement payments must automatically provide, at a minimum, a 50-percent joint and survivor annuity to their retiring married workers. Under a 50-percent joint and survivor annuity, if the retiree dies before the spouse, the spouse will receive an annuity that is 50 percent of the retired worker's monthly pension amount.

To be sure, the Secretary of the Treasury has issued extremely detailed regulations specifying the exact information that must be provided in connections with QJ&SAs and waivers thereof. The relevant regulatory requirements as to what information is to be presented and how it is to be presented is set forth in Treas. Reg. §§ 1.401(a)(11), 1.401(a)-20 and 1.417(e)(1).

With regard to the requirement of spousal consent to a waiver of the QJ&SA, or "Automatic 50% Spouse" benefit as the Weirton Steel and National Steel plans have called it, Treas. Reg. § 1.417(e)-1 further provides that:

> No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values, of the optional forms of benefits available.

As further evidence of the substantial regulatory compliance governing participant waiver of the QJ&SA, and spousal consent thereto, can be found in Treas. Regs. § 1.401(a)-11(c)(3) which provides in relevant part that:

> A plan must provide to participants * * * the following information * * * in written nontechnical language:
>
> (C) A general explanation of the relative financial effect on a participant's annuity of either or both elections as the case may be.

The necessity of a written explanation appears numerous times in ERISA § 1055, IRC § 417 and the governing treasury regulations. The Third Circuit decision to deny Ellinora her share of the QJ&SA in the absence of an explanation is directly contrary to the ERISA § 1055 and the aforementioned regulations of the Department of the Treasury, the agency delegated by Congress to adopt regulations governing QJ&SA disclosure provisions. *See* 29 U.S. C. §1055(l). Under ERISA, no spousal consent is valid absent an explanation of the relative values, of the optional forms of benefits available. Regulations such as these are entitled to deference by the courts. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The existence of these regulations further heightens the need for this Court to grant review over whether surviving spouses are entitled to relief when an ERISA fiduciary fails to adequately disclose and explain rights to a QJ&SA.

In its analysis, the Third Circuit decision found no satisfactory explanation of benefits in the Option Form, yet ignored ERISA's mandate by concluding Ellinora's consent to be valid despite the failure of the Defendants to provide an explanation of the available benefits and the relative financial effect among them.

The Third Circuit's reliance on *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001) fails to support its holding because the *Daniels* case dealt with supplemental life insurance benefits, not the rigorous ERISA § 1055 requirements. Notably, the Third Circuit decision below is the first such case to extend the detrimental reliance standard to a case arising under ERISA § 1055. The Third Circuit does not mention any of the relevant precedents utilized by the other circuits in analyzing ERISA § 1055.

Thus, the Third, Fourth, Seventh and Eleventh Circuits and at least one district court are divided over the scope and breadth of a nonparticipant spouse's rights under ERISA, arriving at a number of conflicting legal analyses under ERISA § 1055(c). Given the large number of ERISA spouse beneficiaries to which ERISA § 1055(c) applies, the need for this Court's review is compelling and immediate.

With specific regard to Ellinora's breach of fiduciary claim under ERISA, the Sixth Circuit has very recently held that: "A breach of fiduciary duty occurs if . . . ERISA or its implementing regulations required the [fiduciary] to provide certain information] and the [fiduciary] failed to do so." *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 451 (6th Cir. 2002); see also *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994) (where the failure to comply with certain governing ERISA sections and the applicable Treasury regulations thereunder amounted to a breach of fiduciary duty); *Larsen v. NMU Pension Plan Trust*, 767 F.Supp. 554, 557 (S.D. N.Y. 1991)

("violation of the regulations is sufficient to establish a breach of fiduciary duty under § 404 of ERISA").

Thus, the Second and Sixth Circuits and at least one district court conclude that the failure of an ERISA fiduciary to comply with ERISA and the applicable treasury regulations is tantamount to a breach of fiduciary duty. At a minimum, fiduciary obligations require ERISA fiduciaries to follow the federal guidelines and provide pensioners and their spouses with a comprehensible explanation of the relative financial effect of a waiver of a QJ&SA.

It is clear that the circuits and at the district courts are in sharp divergence as to the scope and breadth of a nonparticipant spouse's rights under ERISA. Certiorari is warranted to clarify this vitally important aspect of ERISA for all circuits and to affirm the Congressional intent and purpose it intended in adopting the REA amendments to ERISA.

II. CONFLICT ALSO EXISTS WITHIN THE CIRCUITS AS TO WHETHER THE DETRIMENTAL RELIANCE STANDARD OR THE PREJUDICE STANDARD OF REVIEW SHOULD BE APPLIED TO A BENEFICIARY'S ERISA CLAIM

A. The Third Circuit decision goes far beyond any other court decision in applying the detrimental reliance standard to an ERISA § 1055 claim

The circuits are also sharply divided over whether detrimental reliance, prejudice or some other standard is required for deficiencies claimed in plan documentation. However, these standards are usually invoked in cases where there is some dispute over the summary plan description or other plan documentation. The Third Circuit decision in applying the detrimental reliance standard to a case arising under ERISA § 1055 is unprecedented.

The First, Second, Fourth, Eighth and Tenth Circuits permit recovery to a beneficiary upon a showing of either detrimental reliance or prejudice. *See, Govoni v. Bricklayers, Masons & Plasterers Int'l. Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984), *Burke v. Kodak Retirement Income Plan and Kodak Retirement Income Plan Committee*, 336 F.3d 103, 112-114 (2d Cir. 2003), *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-142 (4th Cir. 1993) (*per curiam*); *Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887-888 (8th Cir. 1999); *Chiles v. Ceridian Corp.* 95 F.3d 1505, 1519 (10th Cir. 1996).

The Third, Seventh and Eleventh Circuits require detrimental reliance. *See, Girdley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 n. 8 (3rd Cir. 1991), *Anderson v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992). While the Eleventh Circuit requires detrimental reliance in other types of claims under ERISA, it has not imposed either a detrimental reliance or prejudice standard to a waiver of a QJ&SA under ERISA § 1055. Notably, the Eleventh Circuit has required an ERISA fiduciary to strictly comply with the rigorous ERISA requirements. *See generally, Lasche*, 111 F.3d at 863.

The Fifth and Sixth Circuits *in dicta* would require neither reliance nor prejudice. See *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 983 (5th Cir. 1991) *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F2d 134, 137 (6th Cir. 1988). The Fifth Circuit's decision in *Hansen* provides an interesting analogue to the Third Circuit's decision below. The plaintiff in *Hansen* provided an affidavit in support of summary judgment stating that he read the plan summary and interpreted the summary in a particular way. That affidavit testimony in *Hansen* is not unlike Ellinora's deposition testimony which the Third Circuit found to be hearsay. The Fifth Circuit not only found the affidavit testimony useful, it further found such testimony to be adequate evidence of reliance.

The only written information available to Leo and Ellinora at the June 26, 1996 meeting was the Option Form. As common sense would dictate, the only information available to a participant and nonparticipant spouse at the time of retirement is that

information provided by the ERISA fiduciary. It is hard to imagine a situation where a married couple would rely on anything except the financial information delivered by the plan fiduciaries.

B. A detrimental reliance standard should not be the standard under ERISA § 1055

If the requirements of ERISA § 1055 are not to be strictly applied, this Court should consider whether a prejudice standard or a detrimental reliance standard is more consistent with ERISA's objective to protect the employee and surviving spouse against inaccurate or inadequate disclosures at the time of retirement.

As the *Burke* court observed "'A rule requiring . . . detrimental reliance . . . imposes an insurmountable hardship on many plaintiffs,' especially on the estate of a deceased participant, and '[s]uch a rule hardly advances the Congressional purpose of protecting beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan.'" 336 F.3d at 112. (citations omitted).

Indeed, the *Burke* court reasoned that application of the traditional detrimental reliance test would thwart the substantive objective of ERISA's summary plan description requirement. Further, Congress has promulgated clear directives prohibiting misleading SPDs. The *Burke* court elected not to undermine the legislative command by imposing technical requirements upon the employee. 336 F.3d at 112-113. (citations omitted).

The Third Circuit decision below conceded that,

> If the success of [Ellinora's] appeal depended exclusively upon whether we were to find the form confusing, she likely would succeed in her appeal. It is difficult to find in it a satisfactory explanation as to the result of choosing the Automatic 50% Spouse Option. The waiver and option and its implications were stressed, while the implications of choosing the Automatic 50% Option-were not explained. The form seemingly does not comply with the relevant sections of the ERISA or the accompanying regulations.

Despite this holding, the Third Circuit denied the statutorily and regulatory mandated relief to Ellinora under ERISA because Ellinora had other income sources available to her after Leo's death and, therefore, could not support a claim for detrimental reliance.[4] ERISA is not a means based statute. A correct application of ERISA and its implementing

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[4] Since the case was decided on summary judgment, no factual finding was ever made with respect to detrimental reliance. Moreover, any such finding would be, and otherwise is, irrelevant. Further, a breach of fiduciary duty applies equally to all participants and surviving spouses regardless of their relative wealth. An ERISA fiduciary is not excused from fulfilling its fiduciary duty because a particular surviving spouse is not destitute. Even if a surviving spouse is somewhat financially secure, that factor certainly does not permit an ERISA fiduciary to be less forthright. Thus, under ERISA, Leo and Ellinora's purported economic circumstances in no way should have affected the right to be fully informed of their benefits and the effect of any alleged waiver.

regulations is that if an ERISA fiduciary fails to comply with ERISA and the implementing regulations mandated thereunder, a breach of fiduciary duty by such ERISA fiduciary (and not the plan beneficiary) has occurred. The remedy under ERISA and its implementing regulations is that spousal consent to the QJ&SA is invalid. See Treas. Reg. § 1.417(e)-1. Moreover, except for the Third Circuit decision below, none of the circuits have invoked either a detrimental reliance or prejudice standard involved the interpretation and application of ERISA § 1055.

ERISA provides no support for subjecting a surviving spouse to such a strict standard as the detrimental reliance standard. By applying a detrimental reliance standard for a surviving spouse's claim to her share of the QJ&SA, the Third Circuit has undermined Congress and effectively legislated an amendment to ERISA and its implementing regulations. The purpose and congressional intent of REA, and the regulations subsequently adopted thereunder, is to protect the benefits of a surviving spouse, similarly situated like Ellinora by requiring an understandable explanation of those benefits. There would be no remedy to any surviving spouse under REA if an ERISA fiduciary is permitted to violate ERISA and ignore the treasury regulations when disclosing benefits to a pensioner and his nonparticipant spouse. If Congress and the Treasury required detrimental reliance to be an required element of participant's waiver of a QJ&SA, and spousal consent thereto, it would have not have imposed the rigorous requirements necessary to validate a waiver and spousal consent to a QJ&SA. When statutory language is as clear as it is here, it is simply not the function of

the court to act as a super-legislature and second-guess the policy choices that Congress made. *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *Clinton County Commissioners v. United States Environmental Protection Agency*, 116 F.3d 1018, 1025 (3d Cir. 1997).

Although virtually all of the circuits are clearly in conflict over the legal standard to apply to a beneficiary's claim under ERISA, the Third Circuit's approach dismantles a nonparticipant spouse's protections under ERISA. Given the inapposite approaches to analyzing a nonparticipant spouse's ERISA claims which federal courts have exhibited since the REA-amendments were adopted nearly 20 years ago, the Court should affirm and clarify the congressional and treasury mandate which is vitally important to a significant number of American workers and their spouses. The Third Circuit decision below, declining to enforce the mandatory ERISA remedy for a failure to comply with its regulations, exacerbates the ever-widening and inconsistent application of ERISA to nonparticipant spouses. The Third Circuit decision's overrides the ERISA mandated remedy which invalidates a participant waiver and spousal consent obtained without an adequate explanation of the effects of such waiver, especially where, as here, the participant is forced into an early permanent disability retirement and is much older than his spouse. At a minimum, an ERISA fiduciary must bring home the financial consequences of a waiver of a QJ&SA to a retiring participant and his nonpartipant spouse, at the time of retirement. The spousal consent contemplated under ERISA § 1055 is an informed one.

It is clear that the circuits are in sharp divergence as to the standard applicable to deficiencies in plan documentation prepared and disseminated by an ERISA fiduciary to its beneficiaries. Certiorari is warranted to clarify the appropriate standard under ERISA for all circuits.

III. THE THIRD CIRCUIT DECISION IS IN CONFLICT WITH THIS COURT IN RELATED AREAS

The Third Circuit decision below is inconsistent with this Court's precedent in *Boggs v. Boggs*, 520 U.S. 833 (1997). *Boggs* held that:

> The statutory object of the qualified joint and survivor annuity provisions, along with the rest of § 1055, is to ensure a stream of income to surviving spouses. . . Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA. .

This Court held that the solicitude for the economic security of surviving spouses would be undermined by permitting state law to change ERISA's structure and balance as it applies to a surviving spouse's entitlement to the annuity § 1055 guarantees. *Boggs* at 843, 844.

The *Boggs* reasoning is applicable here. No waiver of a QJ&SA, and spousal consent thereto, is valid, unless such waiver and consent is knowing and full disclosure is made of the amount of monthly benefits which are at stake. To permit a waiver of a

QJ&SA and spousal consent thereto without making the required ERISA disclosures undermines the economic security for surviving spouses that the REA amendments were designed to protect. This is especially true where relative financial effect of the various retirement options is not disclosed and no explanation is provided to the participant and nonparticipant spouse.

IV. FEDERAL AGENCY EFFORTS CONTINUE TO BE FRUSTRATED

After the passage of REA, Congress commissioned a number of studies from the Government Accounting Office to determine the effect of federal pension legislation on women. One such study issued in December of 1989 entitled Private Pensions: Spousal Consent Forms Hard to Read and Lack Important Information (GAO/HRD-90-20, Dec. 1989) captures the essence of the controversy in this case. The GAO reviewed and examined the content and readability of certain government-required pension documents. In particular, the GAO examined the forms that companies use to meet the spousal consent requirement of REA. *Id.* at page 1. Contained on page 34-35 of the 1989 GAO study is a October 13, 1989 letter from then IRS Commissioner, Fred T. Goldberg, Jr. to Lawrence H. Thompson, Assistant Comptroller General of the GAO which states,

> Your report recommends that IRS require employers to provide more understandable spousal consent forms to the spouses of retiring workers. In particular, you suggest that these

> consents should contain specific information and explanations regarding the options for payment of the worker's pension.

The 1989 study has led to additional regulatory changes. Yet, despite the substantial IRS regulation in the area of spousal consents, some of the federal courts, as evidenced by the Third Circuit's decision below, continue to misapprehend ERISA § 1055 and its federal mandate. Based upon the Third Circuit decision below, the practice of failing to adequately disclose benefit options to participants and their spouses will continue, since some of the circuits are willing to deny enforcement of those spousal rights, even when patent violations occur.

CONCLUSION

This case presents two vitally important issues under ERISA as to which the Circuits are in clear conflict. These issues will affect millions of Americans given the tremendous number of married participants covered by privately owned pension plans. The failure of the Third Circuit to adhere to congressional intent in its resolution of this case makes review by this Court imperative. The Third Circuit decision and legal analysis leaves an injured nonparticipant spouse without a remedy for ERISA violations and is directly contrary to the congressional remedy specified in ERISA. The Court should grant the Petition and reverse the judgment of the court below in order to restore order, uniformity and fairness under ERISA and to encourage full, complete and candid disclosure of pension benefits by all privately owned pension plans.

Respectfully submitted,

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No. 02-2547

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ELLINORA V. CAGNA, in her capacity as Executrix of the Estate of Leo Cagna, deceased, and in her own right,
Appellant

v.

WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; WEIRTON RETIREMENT PROGRAM-PLAN 056; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PROGRAM-PLAN 056; NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM; RETIREMENT ADMINISTRATIVE BOARD OF THE NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM

May 13, 2003, Argued
June 23, 2003, Filed

COUNSEL: Henry Gusky Thomas M. Ferguson ARGUED M. Scott Zegeer, Blumling & Gusky, LLP, Pittsburgh, Pennsylvania. Anthony W. Hinkle Cipriani & Werner, Blue Bell, PA, Counsel for Appellant.

Joseph Mack III, Thorp, Reed & Armstrong, LLP, Pittsburgh, Pennsylvania, Counsel for Appellees.

Carl H. Hellerstedt, Jr. ARGUED Babst, Calland, Clements and Zomnir, P.C., Pittsburgh, Pennsylvania, Counsel for Appellees, Weirton Steel Retirement Plan-Plan 001 and Retirement Committee of the Weirton Steel Corporation Retirement Plan-Plan 001.

JUDGES: Before: RENDELL, SMITH and ALDISERT, Circuit Judges.

OPINIONBY: MARJORIE O. RENDELL

OPINION: OPINION OF THE COURT

RENDELL, Circuit Judge.

Ellinora Cagna, the surviving spouse of retiree Leo Cagna, appeals from summary judgment entered in favor of the defendants. The District Court rejected Mrs. Cagna's claim of breach of fiduciary duty under ERISA based on her allegation that an option form signed by her husband, with her signed certification, failed to clearly state the financial impact of a retirement plan option different from the one he elected. We will affirm.

Inasmuch as we write only for the parties who are familiar with the facts of the case, we recite only those facts necessary for our discussion. On June 25, 1996, Mrs. Cagna and her husband met with defendants' representative, Donna Hanna, in order to discuss and decide which pension options were best suited for Mr. Cagna' needs upon his imminent retirement. The

defendants' plan offered four options, entitled, as detailed on the Option Form, as follows: "SURVIVING SPOUSE BENEFIT," "AUTOMATIC 50% SPOUSE (ERISA)," "100% CO-PENSIONER," and "50% CO-PENSIONER."

Ms. Hanna testified that she followed her regular procedure of showing the Option Form to the Cagnas with the printed information as to the potential amounts to be paid under each. She said that she explained, among other matters, that if the AUTOMATIC 50% SPOUSE (ERISA) option was chosen, Leo's pension would be reduced during his lifetime; if Leo died before Appellant, however, Mrs. Cagna would receive the amount of $ 989.74 shown on the Form under the Automatic 50% Spouse option, and this amount would be added to the $ 521.53 amount from the Surviving Spouse Benefit. Hanna had been conducting 20-25 retirement sessions a month since June 1995, following the same procedure in each. She completed the meeting by asking the Cagnas if they had any questions about the Form; neither indicated that he or she did. She also told the Cagnas that they could take the Form home with them if they were not ready to make an election. Following her explanation, Hanna testified, "Mr. Cagna turned to Mrs. Cagna and said, 'What do you think?'" Her response was: "Do whatever you want. I have my own pension benefit."

Appellant remembers the retirement session differently. Although admitting that she and her husband read the "EXPLANATION OF POST RETIREMENT OPTION" and that she read and signed, along with Ms. Hanna, the "POST RETIREMENT OPTION ELECTION AND

CERTIFICATIONS," Appellant claims that Hanna did not give any explanation of the Option Form and denies alluding to having a pension of her own. Notwithstanding her contention that she did not understand the Form, Appellant admits that neither she nor her husband asked any questions. Appellant also understood that she and her husband were making a choice between line 1, "SURVIVING SPOUSE BENEFIT" and line 2, ""AUTOMATIC 50% SPOUSE (ERISA)" on the Form.

At the end of the session, Mr. Cagna checked the line pertaining to the first option, the "Surviving Spouse Benefit" (which was also referred to as "Life Annuity") and he signed the form. In checking that option and signing the form, Mr. Cagna also explicitly acknowledged his rejection of the "Automatic 50% Spouse's Option." Mrs. Cagna also signed the form, specifically consenting to Mr. Cagna's waiver of the Automatic 50% Spouse Option. There is no allegation that Mrs. Cagna did so without adequate opportunity to inquire about the Automatic 50% Spouse Option. Furthermore, Mr. Cagna was in good health at the time, having fully recovered from a heart attack.

Thereafter, Mr. Cagna died. Mrs. Cagna now contends that, based on the form, she believed that, if Mr. Cagna elected the Automatic 50% Spouse's Option, she would only have received $ 989.74. She now understands that, had she opted for the Automatic 50% Spouse Option, she would have received $ $ 989.74 plus the surviving spouse benefit of $ 521.53. She contends that she would have opted for the Automatic 50% Spouse's Option had she understood what her full benefit was.

If the success of Mrs. Cagna's appeal depended exclusively upon whether we were to find the form confusing, she likely would succeed in her appeal. It is difficult to find in it a satisfactory explanation as to the result of choosing the Automatic 50% Spouse's Option. The waiver option and its implications were stressed, while the implications of choosing the Automatic 50% Spouse's Option - which, accepting her contention, Mrs. Cagna would have chosen - were not explained. The form seemingly does not comply with the relevant sections of the ERISA or the accompanying regulations.

However, we have two problems with Mrs. Cagna's contention that, because of this lack of clarity, she is now entitled to opt for the Automatic 50% Spouse's Option instead. First, Mrs. Cagna had the opportunity to inquire about the various options, but she signed the form indicating that she consented to her husband's "election to waive the Automatic 50% Spouse's Option" and acknowledging that she understood that she "will not be entitled to any benefits from the plan (except for any benefits to which [she] may be entitled under the Surviving Spouse's Benefit) in the event that [Mr. Cagna] died before [her]." The form does not necessarily misstate the options, and Mrs. Cagna does not say she received misleading answers to questions about the form. In fact, she does not recall the specific discussions, but now complains that the form does not provide enough information regarding an option not chosen.

Mrs. Cagna is an educated woman. She was eligible for a pension from teaching totaling approximately $ 2,300, and, with her husband, received approximately $ 1,500

per month in rental income from properties that the two owned. Given her certification and her failure to adduce any active misrepresentation or concealment by the company, we find her claim of detrimental reliance to be unsupported. Daniels v. Thomas & Betts Corp., 263 F.3d 66, 73 (3d Cir. 2001) (requiring detrimental reliance for a breach of fiduciary claim under ERISA).

Second, the desire of Mrs. Cagna that we give effect to her "choice," after the fact, of the unexplained option is too speculative. For one thing, the choice was admittedly that of her husband. Under the retirement plan and ERISA, her only role was to evidence her understanding of and agreement in the waiver. Her statement that she would not have signed the waiver if she had fully understood misses the mark. n1 The real question is: What would her husband have chosen? How do we know which of the four options he would have chosen? For all we know, they may have discussed all options more fully and still have chosen the waiver in light of his excellent health at the time. We will not enter an order based on speculation.

* * * * *

The judgment of the District Court will be affirmed.

Marjorie O. Rendell
Circuit Judge

FOOTNOTES

n1 While Mrs. Cagna testified that Mr. Cagna said he would agree to whatever she wanted, this would not be admissible to disprove the fact that the choice of

pension options was his (or would have been a product of their combined thinking or agreement). It is hearsay and therefore does not create a genuine issue at the summary judgment stage. See W.B. v. Matula, 67 F.3d 484, 493 (3d Cir. 1995) ("Summary judgment is appropriate when there are no issues of material fact presented in admissible form and the moving party is entitled to judgment as a matter of law." (emphasis added)).

Civil Action No. 00-1222

IN THE UNTED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELLINORA V. CAGNA, in her capacity as executrix of the Estate of Leo Cagna, deceased, and in her own right,
Plaintiff,

V.

WEIRTON STEEL CORPORATION RETIREMENT PLAN - PLAN 001; RETIREMENT COMMITTEE OF THE OF THE WEIRTON STEEL CORPORATION RETIREMENT PLAN - PLAN 001, WEIRTON RETIREMENT PROGRAM PLAN 056; RETIREMENT COMMITTEEOF THE WEIRTON STEEL PROGRAM; RETIREMENT ADMINISTRATIVE BOARD OF THE NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM
Defendants

MEMORANDUM ORDER

Ellinora V. Cagna, for herself and as Executrix of the Estate of Leo Cagna, filed this action pursuant to the Employee Retirement Income Security Acto of 1974 ("ERISA"), 28 U.S.C. § 1001, et seq. alleging that the defendants, the Weirton Retirement Program- Plan 056, the National Steel Corporation Weirton

Retirement Program, [1] and the plan administrators of these plans, [2] breached their fiduciary duty to and the contract made with the Cagnas when the defendants failed to provide the Cagnas with information essential to their informed selection of post-retirement benefits involving he automatic 50% spousal option.

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[1] The correct name for this defendant is the "Weirton Steel Corporation Retirement Plan- 001."

[2] The name of the Plan 056 administrator has also been clarified. The administrator of this plan is the "Retirement Administrative Board of the Weirton Retirement Program- Plan 056." According to the Defendants: The only proper National Steel Corporation benefit plan defendants in this caseare the Weirton Retirement Program-Plan 056 and the Retirement Administrative Board . . . . The complaint also names "National Steel Corporation Weirton Retirement Program" and "Retirement Administrative Board of the National Steel Corporation Weirton Retirement Program." No such entities exise [and] to the extent that [Cagna] has attempted to name the National Steel Corporation Retirement Program and its administrative board, the complaint must be dismissed because Mr. Cagna never participated in this program. Cagna does not contest this description of the defendants. The proper defendants in this action are, thus, the Weirton Retirement Program- Plan 056, the Weirton Steel Corporation Retirement Plan-Plan 001, and the plan administrator of each program. We refer to these defendants as the "National defendants " and the "Weirton defendants, "respectively.

Leo Cagna, an employee of the Weirton Steel Corporation for more than 44 years, suffered a heart attack in 1995. Following that attack, Cagna assumed a leave of absence and/or disability status which ran form July 4, 1995 to June 30, 1996, that date as of which Cagna elected to accept early retirement. In connection with this retirement, Leo Cagna on June 26, 1996, was asked to sign several documents, on of which was a Post-Retirement Option Election and Certification Form which delineated four options dealing with spousal benefits. Under the provisions of the Internal Revenue Code, plans such as the ones involved here, are required to provide a joint and survivor annuity, the Automatic 50% Spouse Option. Under this option, the plan participant receives a reduced pension during his retirement. After the participants death, the surviving spouse continues to receive monthly payments totaling half the pension amount received by the plan participant during retirement. This Automatic 50% Spouse Option may be waived with the consent of the spouse. If the waiver is elected, the plan participant receives the full pension benefit and his spouse does not receive pension benefits beyond a Surviving Spouse Benefit which is payable whether or not the option is selected.

Leo Cagna elected to waive the Automatic 50% Spouse Option and Mrs. Cagna signed a form consenting to the waiver. Leo Cagna died months later. Mrs. Cagna now claims that the election form describing the financial impact of the several spousal retirement options was misleading, ambiguous, complicated and inadequately explained. Cagna admits that she realized she was waiving entitlement to benefits beyond the Surviving Spouse Benefit should

her husband predecease her, but states that the layout of the form caused her to miscalculate the amount of the benefit waived. Cagna contends that had the form and the explanation of its contents been clearer she would not have waived the 50% Spouse Option and would have elected an option paying a greater benefit to her upon her husband's death.

Each of the parties to this action has filed a pending motion for summary judgment.

I. Standard of Decision

Summary judgment is mandated where the pleadings and evidence on filed show there is no genuine dispute of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. 56(c). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case on which is will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A genuine issue does not arise unless the evidence, viewed in the light most favorable to the non-moving party, would allow a reasonable jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact is material when it might affect the outcome of the suit under governing law. Id. at 248. In reviewing any facts alleged to create a genuine issue, if the Court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and summary judgment must be granted. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. The Motions for Summary Judgment

a. Cagna's Motion for Summary Judgment

We turn first to Cagna's motion. (Doc. 17). The essence of Cagna's breach of fiduciary duty claims is straightforward. She "contends that the documents used by the agent, representative and/or fiduciary of the retirement committee to explain and effectuate the post-retirement option were wholly inadequate with respect to the material provisions affecting Leo Cagna's benefit selection. The documents . . . not only fail[ed] to disclose information essential to the election decision, but . . . guid[ed] [the Cagna] to plausible and logical, but erroneous conclusions."(Doc. 18). Cagna claims that the confusing documents and the inadequate explanation of the information set forth in them constituted a breach of fiduciary duty entitling her to equitable relief under 29 U.S.C. § 1132(a)(3).

Cagna does not rest her breach of fiduciary duty claim on "affirmative misrepresentations in the traditional sense." (Doc. 18). Instead, she contends that the plan fiduciaries failed to disclose essential information, causing her to make an uninformed decision regarding the benefit selection. Specifically, Cagna complains that the forms provided to her were inherently confusing, that plan representative Donna Hanna was inadequately trained, did not undertake a thorough discussion of the Cagna's retirement options, and should, based upon her knowledge of Leo Cagna's health and the four year age difference between Cagna and his wife, have advised the Cagnas not to waive the spousal option.

According to Cagna, the facts underlying her breach of fiduciary duty claim are undisputed, entitling her to judgment as a matter of law. She does not ask that we grant summary judgment on her contract claim.

b. The National Steel Defendants' Motion for Summary Judgment

The National Steel Defendants ask that summary judgment be granted in their favor with respect to all of Cagna's claims. (Docs. 12 and 13). These defendants contend that Cagna has failed to raise any genuine issue of fact as to whether they violated Section 502(a)(3) of ERISA.

The defendants first contend that Cagna lacks standing to pursue this action. They argue that ERISA does not impose upon them any duty to provide Mrs. Cagna with an explanation of her husband's retirement options or to ensure that she understood the terms or import of the consent form; according to these defendants, any duty owed with respect to waiver of spousal benefits ran to Mr. Cagna alone. Since the record does not contain any indication that Mr. Cagna failed to understand the consequence of the waiver, these defendants contend that Mrs. Cagna has failed to state a cause of action. The defendants also allege that the consent form and all of the documents relevant to waiver of spousal benefits satisfied ERISA requirements and are not subject to challenge.

Even had Mrs. Cagna succeeded in stating a claim for breach of fiduciary duty, the defendants argue that the caselaw does not support a finding of liability.

Liability for breach of fiduciary duty has been found in only three types of cases - cases where there has been material misrepresentation, where there has been a material omission with respect to a plan participant, and where a fiduciary has failed to provide information beyond statutory requirements where the administrator knows or should know that a participant or beneficiary needs additional information to make an informed choice. The defendants contend that none of these circumstances is present here and that, in any event, the Cagnas received an explanation of benefit options that was sufficiently clear to negate any inference of breach of fiduciary duty. "Plaintiff has failed to create an issue of fact with regard to whether the Cagnas were provided a legally sufficient explanation of the effect of waiving the joint and survivor option." (Doc. 13).

c. The Weirton Steel Defendants' Motion for Summary Judgment

The Weirton defendants adopt and join in the motion for summary judgment filed by the National defendants. In addition, they ask that we dismiss this action of grant of summary judgment in their favor based upon improper venue and/or lack of personal jurisdiction. [3]

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[3] We need not devote extended discussion to these issues. As the Weirton defendants recognize, jurisdiction and venue arguments virtually identical to those raised here were rejected in Holland v. King Knob Coal Co., Inc., 87 F.Supp.2d 433 (W.D. Pa. 2000). Although these arguments have not been considered by the Court of Appeals for the Third Circuit, they have

III. Analysis

a. The Breach of Fiduciary Duty Claim

We address first the defendants' contention that Cagna lacks standing to maintain this action. We disagree. The Court of Appeals for the Third Circuit has adopted an expansive reading of the standing provisions in ERISA, citing the language of the Ninth Circuit to the effect that "a party has standing to sue . . . if his alleged injury "falls arguably within the zone of interests protected by the statute involved, so long as the statute itself does not preclude the suit.'" Northeast Dept ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 152 (3d Cir. 1985)(quoting Fenton Indus. V. National Shopmen Pension Fund, 674 F.2d 1300, 1304 (9th Cir. 1982). Cagna's claims satisfy this requirement.

We begin our substantive analysis by noting that " Section 502(a)(3) authorizes the award of 'appropriate equitable relief' directly to a participant or beneficiary to 'redress . . . any act or practice which violates any provision of this title' including a breach of the statutorily created fiduciary duty of an administrator." Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.2d 1292, 1298 (3d Cir. 1993)(quoting Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S.

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been rejected by a majority of the Court of Appeals in which they have been raised. We are not persuaded to take a different position here. The motion to dismiss based on lack of jurisdiction and improper venue will be denied.

134, 153 (1985)).[4] This section, now the only one relevant to this case, is available to remedy violations of ERISA's reporting and disclosure requirements only "where the plaintiff can demonstrate the presence of extraordinary circumstances." Jordan v. Federal Express Corp., 116 F.3d 1005, 1011 (3d Cir. 1997)(quoting Ackerman v. Warnaco, Ins., 55 F.3d 117, 124 (3d Cir. 1995)). "'[E]xtraordinary circumstances'" generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant

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[4]In her motion for summary judgment, Cagna clarifies that her breach of fiduciary duty claims are premised only upon Section 502(a)(3). Although the complaint alleges a violation of section 502(a)(1)(B), Cagna does not make any other reference to this section. The Court of Appeals for the Third Circuit has held, in any event, that Section 502(a)(1)(B) is not available to a plaintiff seeking an award of benefits where the benefits sought are determined without reference to reporting or disclosure issues. Hazier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990). Cagna does not contend that she failed to receive benefits due under the terms of the plan; Section 502(a)(1)(B) does not , therefore, apply. To the extent that Cagna relies on that section, her motion for summary judgment will be denied, and summary judgment will be granted in favor of defendants as to this claim. Our conclusion is similar with respect to Section 502(c) of the Act which provides a remedy for refusal to supply requested plan information. The record does not suggest and Cagna does not contend that the defendants refused to supply information. Summary judgment as to the 502(c) claim will, therefore, be granted in favor of the defendants.

change in the plan, or commission of fraud." Id. The record here fails to demonstrate any extraordinary circumstances; summary judgment will, therefore, be granted in favor of defendants insofar as Cagna attempts to state a claim based on the defendants' violation of ERISA's specific disclosure requirements.

An "extraordinary circumstance" is not always required to establish a breach of fiduciary duty. In addition to the specific disclosure requirements set forth in ERISA, fiduciaries have a general duty "to ensure that employees [and plan beneficiaries] receive sufficient information about their rights under employee benefit plans to make well-informed employment and retirement decisions." Harte v. Bethlehem Steel Corp., 214 F.3d 446, 451 (3d Cir.), cert denied, 531 U.S. 1037 (2000). This duty is not satisfied solely through compliance with ERISA's disclosure obligations, In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig., 57 F.3d 1255, 1264 (3d Cir. 1995), and, where a fiduciary knows that certain undisclosed information may be relevant, his duty may be breached even if there was not specific inquiry made. Jordan, 116 F.3d. At 1014.[5]

A plaintiff may also obtain relief under Section 502(a)(3) if he or she is able to demonstrate that a fiduciary has made "inconsistent or confusing statements" and is able to show detrimental reliance on that statement. Harte, 214 F.3d at 448. "A misleading

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[5] The record does not show that Donna Hanna had information the she did not make available to the Cagnas or that she was or should have been aware of Mr. Cagna's health status.

statement or omission by a fiduciary is actionable if 'there is a substantial likelihood that it would mislead a reasonable employer in making an adequately informed retirement decision,'" id. at 452 (quoting Unisys, 57 F.3d at 1264), and there is "uncontroversial evidence of detrimental reliance." Daniels v. Thomas & Betts Corp., 263 F.3d 66, 75 (3d Cir. 2001). The Retirement Committee, in administrative proceedings, concluded that there had been a breach of fiduciary duty. The Court of Appeals for the Third Circuit has yet to specify the standard of review applicable to this determination. We need not resolve this question here because under either the deferential "arbitrary and capricious" standard or the more stringent de novo standard, we would uphold the decision of the Retirement Committee.

Cagna contends that the layout of the election form governing spousal benefits provided to her husband during his retirement interview rendered the form ambigious, complicated and misleading. She states that as a result of the confusion generated by this document, her husband made and she consented to election of a spousal option which they would not have been chosen had the form been less confusing or had explanation of the form been complete. We do not dwell upon this aspect of Cagna's case. Even if we assume, arguendo, a substantial likelihood that the election form supplied by the defendants was so confusing as to mislead a reasonable employee as to his pension options, the record fails altogether to demonstrate incontrovertible evidence -- or even a

reasonable inference-- of detrimental reliance by either of the Cagnas.[6]

The record does not indicate that the Cagnas expressed confusion when presented with the election form or that they asked even one question regarding the calculation of benefits. Mrs. Cagna's deposition testimony establishes that at the time of Mr. Cagna's retirement, his health was "fine," that after recovering from his heart attack he did not suffer from heart-related problems, and that she did not believe that her husband's death was imminent. (Cagna dep. 38-40). The defendant's representative, Donna Hanna, testified without contradiction that she did not know the particulars of Mrs. Cagna's health concerns and that the Cagnas did not advise her of any medical issue bearing on Mr. Cagna's retirement. The election made here was consistent with the Cagna's treatment of a pre-retirement survivor's annuity, where there has not been any allegation of misunderstanding. (Cagna 67-68). In 1985, Mr. Cagna waived and Mrs. Cagna consented to the waiver of a pre-retirement survivor's annuity. This waiver was similar to the waiver at issue here, but applied to benefits payable where a plan participant dies before retirement. Given Mrs. Cagna's testimony that she believed her husband to be in "fine" health as of the retirement interview, we agree with the defendants that "[the prior] waiver . . . and consent .

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[6] Mrs. Cagna's conclusory statement that she would not have consented to the waiver of benefits had she understood the election form is not enough to defeat the defendants' motion for summary judgment. See Blair v. Scott Specialty Gases, 283 F.3d 595, 608 (3d Cir. 2002).

. . [were] strong evidence that Leo Cagna's repeat waiver of the [retirement] benefit and [Mrs. Cagna's] consent at the time of the retirement was what plaintiff intended." (Doc. 20).

The record reveals that waiver of the joint and spousal annuity is the norm, with only about 2% of plan participants and their spouses choosing not to waive the benefit. Furthermore, the Cagnas' financial situation, as detailed in the record, does not suggest that their choice to waive the benefit was unwise.

We are convinced that Cagna's choice to waiver the spousal annuity cannot reasonably be attributed to any alleged confusion resulting from the election form. The form set forth all of the information mandated under ERISA and, as the Retirement Committee concluded during the course of administrative proceedings, the contents of this form were explained to the Cagnas by Donna Hanna.[7] Furthermore, we agree with the defendants that "even if [Cagna] had all of the facts and explanation she claims she needed but didn't have, it is an open question whether she would have refused to consent to Leo's waivers." (Doc. 20). Given reasonable assumptions about the Cagnas' life expectancies and the other income available to Mrs.

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[7] The Plan reserved to this Committee power to make binding findings of fact. As a result, we review those findings of fact under an arbitrary and capricious standard. Mitchell v. Eastman Kodak, 113 F.3d 433 (3d Cir. 1997). Nothing in this record suggests that the Committee's findings of fact in this matter were either arbitrary or capricious.

Cagna, their choice made economic sense at the time it was made.

In sum, we are unable to in this record any reliable indication that the Cagnas' waiver of the spousal annuity resulted from any confusion caused by the structure of the election form. The waiver could just as well have been based on a sound evaluation of economic factors having nothing to do with the form itself.

Because Mrs. Cagna has failed to substantiate even any inference of detrimental reliance, the breach of fiduciary duty claim fails. We will deny Cagna's request for summary judgment and will grant summary judgment on the breach of fiduciary duty claim in favor of the defendants.

b. The Contract Claim

Cagna's breach of contract claim is pre-empted by 29 U.S.C. § 1144(a). This ERISA section provides that ERISA preempts all state laws that "relate to any employee benefit plan" covered by ERISA. Because the contract claim filed by Cagna falls within this preemption provision, we will grant the defendants' motions for summary judgment as to this claim. See Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989).

For the foregoing reasons, **IT IS HEREBY ORDERED** that

1. Cagna's Motion for Summary Judgment (Doc. No. 17) is **DENIED.**

2. The Motion to Dismiss For Improper Venue and/or Lack of Personal Jurisdiction (incorporated in Doc. 15) is **DENIED.**

3. Motions for Summary Judgment filed by the defendants (Docs. 12 and 15) are **GRANTED.**

SO ORDERED this 7th day of May, 2002.

Robert J. Cindrich
United States District Judge

cc:

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Civil Action No. 00-1222

IN THE UNTED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

ELLINORA V. CAGNA, in her capacity
as executrix of the Estate of Leo Cagna,
deceased, and in her own right,
Plaintiff,

V.

WEIRTON STEEL CORPORATION
RETIREMENT PLAN - PLAN 001;
RETIREMENT COMMITTEE OF THE
OF THE WEIRTON STEEL CORPORATION
RETIREMENT PLAN - PLAN 001, WEIRTON
RETIREMENT PROGRAM PLAN 056;
RETIREMENT COMMITTEEOF THE
WEIRTON STEEL PROGRAM; RETIREMENT
ADMINISTRATIVE BOARD OF THE
NATIONALSTEEL CORPORATION
WEIRTON RETIREMENT PROGRAM
Defendants.

MEMORANDUM ORDER

This action was brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 28 U.S.C. § 1001, et seq. alleging that the defendants, the Weirton Retirement Program – Plan 056, the National Steel Corporation Weirton Retirement Program, and the plan administrators of these plans, breached their fiduciary duty to and the

contract made with the Cagnas when the defendants failed to provide the Cagnas with information essential to their informed selection of post-retirement benefits involving the automatic 50% spousal option. Pending before this court is Plaintiff's Motion for Reconsideration, Request for Oral Argument and/or Remand to the Retirement Committees (Doc. 30) related to the court's denial of plaintiff's motion for summary judgment and grant of summary judgment for the defendants.

Standard of Decision

The United States District Court for the Eastern District of Pennsylvania has written helpfully on the standard for deciding a motion for reconsideration:

> The United States Court of Appeals for the Third Circuit has held that "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Cohen v. Austin, 869 F.Supp. 320, 321 (E.D. Pa.1994) (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171, 106 S. Ct. 2895, 90 L.Ed.2d 982 (1986)). Accordingly, a district court will grant a party's motion for reconsideration in any of three situations: (1) the availability of new evidence, (2) an intervening change in controlling law, or (3) the need to correct a clear error of law or to prevent manifest unjustice. Reich v. Compton,

834 F. Supp. 753, 755 (E.D. Pa. 1993) (citing Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992)).

New Chemic (U.S.), Inc. v. Fine Grinding Corp., 948 F.Supp. 17, 18-19 (E.D. Pa. 1996).

Because of the interest in finality, at least at the district court level, motions for reconsideration should be granted sparingly; the parties are not free to relitigate issues the court has already decided. Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1107 (E.D. Pa. 1992). Stated another way, a motion for reconsideration is not properly grounded in a request for a district court to rethink a decision it has already made, rightly or wrongly. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993). P. 50 and 59 ("Rule 50 Motion").

Just so here. Plaintiff is understandably unhappy with the legal analysis the court made in rendering our earlier decision. She also takes issue with certain inferences we have drawn from admitted facts. However, nowhere in the motion for reconsideration does plaintiff point to any intervening change in the law or newly discovered evidence. We see no reason to hear oral arguments as we have received extensive briefing from the parties. Given our conclusions of law, we do not believe that a remand to the retirement committees would be appropriate or even helpful. That the plaintiff disagrees with our ruling is simply no ground for the court to reconsider. If we have erred on the law, an appropriate appeal may be taken.

SO ORDERED this 20th day of May, 2002.
Robert J. Cindrich
Robert J. Cindrich
United States District Judge

cc:

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No. 02-2547

UNTED STATES COURT OF APPEALS,
THIRD CIRCUIT

ELLINORA V. CAGNA, in her capacity as executrix of the Estate of Leo Cagna, deceased, and in her own right,
Appellant,

v.

WEIRTON STEEL CORPORATION RETIREMENT PLAN - PLAN 001; Retirement Committee of the Weirton Steel Corporation Retirement Plan- 001; Weirton Retirement Program-Plan 056; Retirement Committee of the Weirton Steel Corporation Retirement Program-Plan 056; National Steel Corporation Weirton Retirement Program ; Retirement Administrative Board of the National Steel Corporation Weirton Retirement Program.

On appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 00-cv-01222). District Judge: Honorable Robert J. Cindrich.

Argued May 13, 2003

Before: RENDELL, SMITH AND ALDISERT, Circuit Judges.

Present: SCIRICA, Chief Judges, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, and CHERTOFF, Circuit Judges

SUR PETITION FOR HEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for hearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

signature illegible
Circuit Judge

Dated: July 23, 2003

STATUTES AND REGULATIONS

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
29 U.S.C. §§1001 et seq.

29 U.S.C. § 1055

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

* * *

Each pension plan to which this section applies shall provide that –

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a joint and qualified survivor annuity

(b) Applicable plans

(1) This section shall apply to –

(A)any defined benefit plan,

* * *

(c) Plans meeting requirements of section

(1) A plan meets the requirements of this section only if-

(A) under the plan, each participant-

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit (or both), and

(ii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4).

(2) Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless –

(i) the spouse of the participant consents in writing to such election, (ii)such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent* * * (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative of notary public, or * * *

(3)(A) Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary of the Treasury may prescribe) a written explanation of -

(i) the terms and conditions of the qualified joint and survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

(iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

(d) "Qualified Joint and survivor annuity" defined

For purposes of this section the term "qualified joint and survivor annuity" means an annuity –

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant * * *

(k) Spousal consent

No consent of a spouse shall be effective for purposes of subsection (g)(1) or (g)(2) of this section (as the case may be) unless requirements comparable to the requirements for spousal consent to an election under subsection (c)(1)(A) of this section are met.

(l) Regulations; consultation of Secretary of Treasury with the Secretary of Labor

In prescribing regulations under this section, the Secretary of the Treasury shall consult with the Secretary of Labor.

INTERNAL REVENUE CODE OF 1986

Subchapter D, 26 U.S.C. §§401 et seq.

§ 401. Qualified pension, profit-sharing, and stock bonus plans

* * *

(11) Requirement of joint and survivor annuity and preretirement survivor annuity-

(A) In general.- In the case of any plan to which this paragraph applies, except as provided in section

417, a trust forming part of such plan shall not constitute a qualified trust under this section unless-

(i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity

* * *

(B) Plans to which this paragraph applies-This paragraph shall apply to-

(i) any defined benefit plan,

* * *

Subchapter D, 26 U.S.C. § 417

§ 417. Definition and special rules for purposes of minimum survivor annuity requirements

(a) Election to waive qualified joint and survivor annuity of qualified preretirement survivor annuity * * *

(2)Spouse must consent to election * * *

(3) Plan to provide written explanation-

(A)Explanation of joint and survivor annuity- Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and

consistent with such regulations as the Secretary may prescribe), a written explanation of –

(i)the terms and conditions of the qualified joint and survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

(iv)the right to make, and the effect of, a revocation of an election under paragraph (1).

* * *

(b) Definition of qualified joint and survivor annuity.- For purposes of this section and section 401(A)(11), the term qualified joint and survivor annuity" means an annuity-

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant

* * *

(6) Requirements for certain spousal consents. –No consent of a spouse shall be effective for purposes of subsection (e)(1) or (e)(2) (as the case may be) unless requirements comparable to the requirements for spousal consent to an election under subsection (a)(1)(A) are met.

(7) Consultation with the Secretary of Labor. – In prescribing regulations under this section and section 401(a)(11), the Secretary shall consult with the Secretary of Labor.

26 C.F.R. § 1.401

§ 1.401(a)-11.

(3) A plan must provide to participants * * * the following information * * * in written nontechnical language:

(C) A general explanation of the relative financial effect on a participant's annuity of either or both elections as the case may be.

Various methods may be used to explain such relative financial effect. With regard to a qualified joint and survivor annuity, they include: information as to the benefits the participant would receive under the qualified joint and survivor annuity stated as an arithmetic or percentage reduction from a single life

annuity; a table showing the difference between a straight life annuity and a qualified joint and survivor annuity in terms of a reduction from the straight life annuity or, in the case of a profit-sharing plan, an approximate dollar amount reduction. The notice and explanation required by this subdivision (i) must also inform the participants of the availability of the additional information specified in subdivision (iii) of this subparagraph and how they may obtain such information.

§ 1.401(a)-20.

* * *

Q36: How do plans satisfy the requirements of providing participants explanations of QPSAs and QJSAs?

A36: Section 417(a)(3) sets forth the requirements for providing plan participants written explanations of QPSAs and QJSAs. The requirement that the terms and conditions of the QJSA or QPSA, as the case may be, be furnished to participants is not satisfied unless the written explanation complies with the requirements set forth in §1.401(a)-11(c)(3). Also, for plan years beginning after December 31, 1988, participants must be furnished a general description of the eligibility conditions and other material features of the optional forms of benefit and sufficient additional to explain the relative values of the optional forms of benefit available under the plan (e.g., the extent to which optional forms are subsidized relative to the normal form of benefit or the interest rates used to calculate the optional forms).

* * *

26 C.F.R. § 1.417

§ 1.417(e)-1. Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.

(a) *Scope-* (1) *In general.* A plan does not satisfy the requirements of sections 401(a)(11) and 417 unless it satisfies the consent requirements, the determination of present value requirements and the other requirements set forth in this section.

* * *

(2)*Consent.* (i) Written consent of the participant and, if the participant is married at the annuity starting date and the benefit is to be paid in a form other than a QJSA, the participant's spouse (or, if either the participant or the spouse has died, the survivor) is required * * * No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values of, the optional forms of benefit available under the plan in a manner which would satisfy the notice requirements of section 417(a)(3). See § 1.401(a)-20 Q&A 36.

* * *

(2)

MOTION FILED

DEC 2 9 2003

No. 03-771

In the

Supreme Court of the United States

ELLINORA V. CAGNA, in her capacity as Executrix of the Estate of Leo Cagna, deceased and in her own right

Petitioner,

v.

WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; WEIRTON RETIREMENT PROGRAM-PLAN 056; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PROGRAM-PLAN-056; NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM; RETIREMENT ADMINISTRATIVE BOARD OF THE NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Lawrence E. Bolind, Jr., Esq.
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Attorney for Amicus Curiae

MOTION FOR LEAVE OF COURT BY THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of the Supreme Court of the United States, Motion is hereby made to file the foregoing Brief of the Women's Institute for a Secure Retirement ("WISER") as *amicus curiae* in support of Petitioner:

1. WISER desires file an amicus curiae brief in the foregoing matter

2. By the letter dated December 19, 2003, legal counsel for *amicus* has sought the consent of all the parties to file an *amicus curiae* brief in accordance with Rule 37 of the Supreme Court of the United States.

3. Petitioner has consented in writing to the filing of such brief which letter dated December 23, 2003 has been filed with the Clerk of this Court.

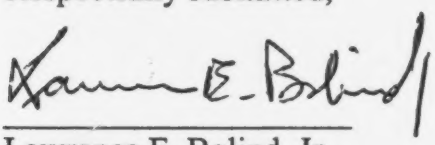
4. Neither Respondent has consented to the filing of the *amicus curiae* brief.

5. The undersigned has filed his application to this Honorable Court on December 23, 2003, which application is pending.

WHEREFORE, the undersigned on behalf of WISER, hereby respectfully requests that the attached Brief of the

Women's Institute for a Secure Retirement as *Amicus Curiae* in Support of Petitioner be accepted.

Respectfully submitted,



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BRIEF OF THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Women's Institute for a Secure Retirement ("WISER") respectfully submits this *amicus curiae* brief in support of the Petitioner Ellinora V. Cagna. Correspondence reflecting the Petitioner's consent to the filing of *amicus curiae* brief has been filed with the Clerk of Court.[1] However, neither Respondent has consented to the filing of this brief, thus, a Motion for Leave of Court to File an *Amicus Curiae* Brief has been included herewith.

INTEREST OF *AMICUS CURIAE*

WISER is a nonprofit organization founded in 1996 which focuses exclusively on increasing awareness of the structural barriers that prevent women from fair participation in the nation's retirement systems. WISER strives, through education, to improve women's opportunities to achieve a secure retirement. WISER is a national organization which was created by The Teresa and H. John Heinz III Foundation. Since 1996, WISER has received financial support from numerous individual donors and a host of charitable foundations. In 1998, WISER was awarded a highly competitive grant from the U.S. Administration on Aging. WISER is an outgrowth of the Women's Retirement Initiative. The Women's Retirement Initiative is part of the Philanthropies' continuing effort to raise the profile of critical issues relating to pensions and retirement savings, particularly with respect to women. WISER is the nation's only nonprofit organization wholly devoted to providing women with the critical skills and information needed to improve their

---

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation and submission of this brief.

economic circumstances and plan for a financially sound retirement.

Under a defined benefit plan, employees are given the option of various payment methods at retirement. According to data on benefits from the National Compensation Survey, in 2000 virtually all employees covered by a defined benefit plan were given the option of a joint and survivor annuity.[2] Blostin, *Payment Options under Retirement Plans*, Bureau of Labor Statistics, April 28, 2003 at 1.

Surviving spouses across the United States have a vital interest in the issues raised in this case given the tremendous number of women who, at sometime during their lives, will become a surviving spouse of an American worker covered by a privately maintained pension plan. During 2003, approximately 20 million American workers were covered by private pension plans containing the ERISA mandated qualified joint and survivor annuity ("QJSA"). *Employee Benefits Survey*, Incidence of Defined Benefit Pension, United States Department of Labor, Bureau of Statistics. The Weirton Steel Corporation Retirement Plan, one of the respondents in this case, covers approximately 3,500 active employees and 10,000 retirees and their dependents. *The Charleston Gazette,* October 22, 2003 at 1, col. 1. The number of American workers and their spouses affected by the issues in this case is unquestionably substantial. Furthermore, women are especially affected by the issues raised in the petition because women tend to live longer than men and men tend to marry younger women. Moreover, women are five times more likely to become

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[2] Under ERISA § 1055, defined benefit plans must make a qualified joint and survivor annuity the normal form of benefit payment for married participants. This method of payment provides the surviving spouse at least one-half of the amount of the employee's benefit during the course of the lifetime.

widowed than men. Forman, *Pension Benefits for Widows*, The Journal Record, January 5, 1999 at 5.

Because of the importance of these issues to WISER and to surviving spouses across the United States, WISER respectfully submits this brief urging the Court to grant the petition for certiorari, reverse the decision below, and require pension plans to comply with the Employee Retirement Insurance Security Act of 1974 ("ERISA"), the Internal Revenue Code of 1986, as amended (the "IRC") and the implementing treasury regulations, especially providing a written explanation as to the financial effects of waiving a QJSA.

REASONS FOR GRANTING THE WRIT

The petition in this case presents two vital questions of importance to American workers who participate in privately operated employee benefit plans. Is a pensioner's waiver and a spouse's consent to such waiver valid if the ERISA fiduciary fails to comply with the disclosure requirements contained under ERISA? Is it necessary for a surviving spouse to prove she detrimentally relied on the inaccurate financial information provided by the ERISA fiduciary in order to succeed in her claim for a share of the ERISA-mandated Qualified Joint and Survivor Annuity?[3] The decision below is fundamentally at odd with ERISA, the IRC and the governing regulations as they apply to pensioner's waiver of, and a spousal consent to, a QJSA offered by a private pension plan. In order to ensure full

[3] It should be noted the second question presented in the petition for certiorari is virtually the same as the question presented in *Burke v. Kodak Retirement Income Plan and Kodak Retirement Income Plan Committee*, 336 F.3d 103 (2d Cir. 2003), petition for cert. filed, October 17, 2003 (No. 03-565). Thus, even the current petitions pending before this Court evidence the fact that this issue will continue to recur unless resolved by this Court.

disclosure of spousal rights to benefits, federal statutory and regulatory requirements must be strictly applied.

The Third Circuit decision below not only goes far beyond that of any other circuit that has addressed both issues raised in the petition, it also directly contravenes the purpose of REA. Congress intended a surviving spouse automatically receive a 50% share of the QJSA unless certain rigorous requirements were met in obtaining a participant's waiver of the QJSA and spousal consent thereto. See ERISA § 1055(c) and IRC § 417. It is inconceivable that Congress and the Treasury intended that a surviving spouse meet any standard of proof when an ERISA fiduciary fails to follow the federal requirements for validly effectuating a waiver of the ERISA mandated QJSA and certainly not a strict standard such as the detrimental reliance standard invoked by the Third Circuit decision below. There is no indication in the text or history of the REA amendments to ERISA that any modicum of proof be imposed on a surviving spouse to succeed in a claim for a share of the QJSA. The Court should grant this Petition to resolve the sharp conflict among the circuits, to confirm the spousal rights intended under REA and to make clear that detrimental reliance is not a prerequisite to a spouse's recovery of her share of the QJSA.

A. Certiorari Should Be Granted to Resolve the Existing Circuit Splits on the Two Questions Raised in the Petition and Establish Nationwide Uniformity on Issues Directly Affecting a Surviving Spouses Rights Under ERISA

The petition clearly demonstrates the sharp division among the circuits on the two questions presented in this case. The first question is addressed at length in the petition and will be only briefly discussed here. At least nine circuits have addressed the second question presented in the petition applying an array of different legal standards.

The inconsistency among the circuits on the question of an ERISA fiduciary's failure to comply with the disclosure requirements specified in ERISA § 1055, IRC §§ 401(a)(11), 417 and the governing treasury regulations flagrantly ignores the congressional and treasury mandate in providing a spouse with protection from an unwitting consent to a waiver of the QJSA. After being on the books for nearly 20 years, the breadth and scope of the spousal rights created under the Retirement Equity Act of 1984 is now squarely before the Court. WISER submits that the need for Court review in this case is amplified, since most surviving spouses lack the financial means or knowledge to enforce their rights under ERISA in the federal courts. The Court may not have the opportunity again to confirm the Congressional and Treasury mandate contained in ERISA § 1055, the IRC and the governing regulations intended by REA.

The inconsistency among the circuits on the second petition question of whether detrimental reliance or the prejudicial standard should apply to a beneficiary's claim will clearly repeat itself unless this Court resolves the conflict. *See Burke v. Kodak Retirement Income Plan and Kodak Retirement Income Plan Committee* , 336 F.3d 103 (2d Cir. 2003), petition for cert. filed, October 16, 2003 (No. 03-565). While the answer to this federal question lacks a clear congressional mandate, applying the detrimental reliance standard to a surviving spouse's claim for her share of the QJSA is illogical. This Court should ensure the circuits do not undermine the legislative command and treasury efforts by imposing technical requirements on participants and their spouses which requirements are virtually impossible to meet. See *Edwards v. State Farm Mutual Ins. Co.* 852 F2d. at 134, 137 (6th Cir. 1988).

This Court has acknowledged the unique importance of ensuring uniformity and certainty under ERISA, given "the

comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). ERISA was enacted specifically to supplant the common-law system of varying state-by-state regulation of employee benefit plans with a single federal regulatory scheme, to provide beneficiaries of such plans a measure of stability and security in the enforcement of the laws governing employee benefit plans. As this Court advised:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987).

ERISA thus reflects a "congressional mandate for the uniform and comprehensive regulation" of employee benefit plans. *Boggs*, 520 U.S. at 836. Ensuring a system of "nationally uniform plan administration" is a core . . . concern" of the statute. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-148 (2001).

This case has the unique quality of proposing two separate questions upon which the circuits are in disarray. The current stark inconsistencies among the circuits as to the breadth and scope of a surviving spouses rights under ERISA

ignores the congressional and regulatory mandate and the chief concerns congress contemplated when it adopted REA. Given the severe financial restrictions on most surviving spouses, we will never know how many surviving spouses have been unable to enforce their ERISA rights, since many surviving spouses do not have the financial means to bring and maintain a case in the federal courts. Further, absent a mandate by this Court, pension plan fiduciaries will continue to be careless about the financial disclosures made to a participant and spouse at the time of retirement, since some of the circuits are not strictly enforcing the ERISA § 1055 required disclosures. A surviving spouse's success in recovering a share of the QJSA may depend upon which circuit the spouse lives or where the spouse elects to sue. This is patently unfair.

The split among the circuits on the second question presented in the petition is even wider and deeper, as virtually every circuit has had an opportunity to issue its own rule of law. Suffice it to say that review in this case is especially urgent given substantial number of Americans affected by the issues raised in this case upon which the circuits are in sharp divergence.

B. ERISA Requirements Underlying A Valid Waiver Of A QJSA Should Be Strictly Enforced And Proof Of Detrimental Reliance Should Never Be Required Of A Surviving Spouse To Recover A Share Of The QJSA Since Detrimental Reliance is a Concept Under Contract Principles Rather than Fiduciary Trust Principles

As the Petition correctly states, the Third Circuit decision below takes the unprecedented step of extending the detrimental reliance standard to a surviving spouse's claim for her ERISA-mandated QJSA. The detrimental reliance standard usually is applied to a plaintiff seeking to obtain

benefits on the basis of statements or omissions in the summary plan description, and usually in the context of a conflict with the underlying plan documents. Under the Third Circuit's novel interpretation of the REA amendments to ERISA, few, if any, surviving spouses could recover a share of the ERISA mandated QJSA which has been unwittingly waived by a pensioner.

The Third Circuit decision below fails to appreciate the REA amendments to ERISA in a manner incompatible with the statutory and regulatory scheme specified in ERISA, the IRC and the governing regulations. At a minimum, the surviving spouse should be given a written explanation of the benefits that are being waived. If this does not occur, any waiver of the QJSA, and consent to such waiver is not an informed one. This Court and well as federal courts across the country has a plethora of precedent in other areas of the law requiring sufficient explanation and disclosure to enable a person to make an knowing and intelligent decision. See for example *Zinermon v. Burch*, 494 U.S. 113, 123 (1990). Further, the Treasury regulations contemplate that a participant's consent be knowing by requiring the written explanation the Third Circuit concluded was lacking. 26 C.F.R. § 1.417(e)-1(2)(i) provides in pertinent part, that "No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values of, the optional forms of benefit available under the plan . . ."

The equitable principle of promissory estoppel and the use of the detrimental reliance standard may be appropriate for extra plan benefits promised under a summary plan description, but certainly that standard is not applicable to spousal benefits guaranteed under ERISA § 1055. The conclusion that, in enacting REA, Congress intended a surviving spouse must detrimentally rely on the plan fiduciaries' failure to provide a written explanation in a

pensioner's retirement election form is fundamentally at odds with the congressional judgments reflected in ERISA and the IRC. This is not a case of extra-plan benefits based upon a summary plan description, but survivor income benefits mandated under ERISA. These survivor income benefits are automatic under ERISA unless a knowing waiver and consent is obtained from a participant and spouse.

With specific regard to the case at bar, no trial occurred since the case was decided on summary judgment by the district court and affirmed by the Third Circuit. Thus, no finding of fact was ever made with respect to whether petitioner relied on the fiduciaries incomplete disclosures or whether petitioner would have refused to consent to a waiver of the QJSA had complete disclosure be made.

The most glaring defect in the Third Circuit's reasoning is its application of contract principles rather than trust principles to govern whether a surviving spouse is entitled to her share of the QJSA. Detrimental reliance has its genesis in the promissory estoppel area of contract law. However, the genesis of ERISA's fiduciary standards is in the common law of trusts, Congress plainly intended the courts to apply under ERISA the same standard of review that prevails under trust law. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); see *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Gilbert v. United States*, 370 U.S. 650, 655 (1962). The Third Circuit decision below improperly places the burden of proof on the surviving spouse, rather than on the ERISA fiduciary. In the case at issue, the pension plans never complied with the federal statutory and regulatory requirements of a clear and comprehensible written explanation of the effects of a waiver of a QJSA. The fiduciary prepared and presented the form containing the retirement options. The Third Circuit's failure to discuss the other federal cases decided under ERISA § 1055 and its reliance on *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73

(3d Cir.2001), a case which did not involve ERISA§ 1055 is not only absurd, but also patently unfair.

The importance of the fiduciary duties under ERISA when presenting retirements to a retiree and the nonparticipant spouse is without question. Justice Cardozzo's now famous articulation of the fiduciary obligation captures the essence of the duty owed to retirees and their spouses:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928).

It cannot be clearer that fiduciary obligations require ERISA fiduciaries, at a minimum, to follow the federal statutory and regulatory guidelines in disclosing retirement benefit options to retirees and their nonparticpant spouses.

The option form prepared and presented to Leo and Ellinora by the Weirton Steel and National Steel plan is faulty as a matter of law and, therefore, Leo's waiver and Ellinora's consent is ineffective under ERISA § 1055. However, if as the Third Circuit suggests, it is relevant for Ellinora to prove what Leo would have elected to do had full disclosure been made, to require a showing of detrimental reliance imposes an insurmountable burden on a surviving spouse. Because Leo has died, Ellinora cannot ask him whether he relied on the faulty form to show detrimental reliance. When detrimental reliance cannot be proven, possible or probable prejudice is

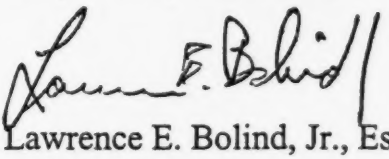
the standard. See, e.g. *Manganaro v. Welfare Fund of Local 771*, 21 F. Supp. 2d 284, 296 (S.D.N.Y. 1998).

The current inconsistencies evidenced by the circuits in enforcing spousal rights disserves REA, the implementing treasury regulations and the entire body of work which has evolved. Allowing the circuits to inconsistently enforce spousal rights to a share of the QJSA will result in undeserved windfalls to privately maintained pension plans at the expense of unwitting participants and their spouses.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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